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No. 91-1518

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

LILLIE E. PARKER, *et al.*, and SIMILARLY SITUATED UNNAMED PLAINTIFFS,

Petitioners,

v.

GWENDOLYN KING, Commissioner of the Social Security Administration, LOUIS SULLIVAN, Secretary, Department of Health and Human Services, and the UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the United States Court of Appeal for the Eleventh Circuit

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PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

Petitioners maintain that section 16(b) of the Fair Labor Standards Act (29 U.S.C. 216(b)), *in conjunction with* section 1331 of Title 28, provides a basis for district court jurisdiction over their pay claims independent of the Tucker Act. Hence, we challenge the court of appeals' ruling that the Tucker Act provides the sole jurisdictional basis for FLSA claims against the federal government. In short, we contend that, contrary to the lower court's decision, the Federal Circuit does not have exclusive jurisdiction over petitioners' appeal under 28 U.S.C. 1295(a), and that the Eleventh Circuit possessed appellate jurisdiction over petitioners' claims.

As we have shown (Pet. 4-7), the court of appeals' conclusion conflicts with this Court's clear instruction in *Bowen v. Massachusetts*, 487 U.S. 879, 910, n.48 (1988), that Tucker Act jurisdiction is "exclusive," "only to the extent that Congress has not granted any other court authority to hear claims that may be decided by the Claims Court." Moreover, as we further demonstrated (Pet. 8-11), the court of appeals' decision is in square conflict with decisions of the Second, Eighth, and D.C. Circuits, holding that jurisdiction independent of the Tucker Act is conferred by jurisdictional statutes, such as 28 U.S.C. 1331, where another statute, such as section 16(b) of the FLSA, waives the sovereign immunity of the United States. Given the deep and growing division among the lower courts on the issue presented by petitioners, the need for guidance from this Court is acute.

1. The government does not, and of course cannot, contest that *Bowen* teaches that Tucker Act jurisdiction is in no way "exclusive" where Congress has granted another court authority to hear claims that may also be decided by the Claims Court. Although it appears to abandon significant elements of the reasoning of the court below, the government maintains that the court of appeals' ruling can be reconciled with *Bowen*.

The government acknowledges that section 16(b) of the FLSA provides a waiver of immunity for overtime claims against the federal government in courts of "competent" jurisdiction. The government urges, however, that the Eleventh Circuit's decision is correct on the grounds that when the federal government is sued for backpay and damages, a federal court of "competent" jurisdiction must be exercising Tucker Act jurisdiction because such claims "are cognizable only under that scheme unless another statute has directed them elsewhere." Op. Cert. 8.

The government's asserted rationale in defense of the lower court's ruling is highly conclusory and circular in

the extreme. It completely begs the question to which *Bowen* requires an answer—namely, whether Congress has provided "any other court authority" (487 U.S. at 910, n.48) to hear petitioners' claims. In failing to come to grips with this question, the government ignores the plain language of 28 U.S.C. 1331. Section 1331 establishes that U.S. district courts *are* courts of "competent" jurisdiction to hear FLSA claims, by giving them original jurisdiction over claims that arise under the laws of the United States. Specifically, section 1331 expressly and unqualifiedly provides that the district courts "shall" have jurisdiction over "*all* civil actions arising under the . . . laws . . . of the United States." *Id.* (emphasis added). When section 1331 is read in combination with 29 U.S.C. 216(b)'s waiver of sovereign immunity, it is manifest that Congress has vested federal district courts with "authority to hear [petitioners']claims" against the government for backpay—authority that is in no way contingent upon the Tucker Act. 487 U.S. at 910, n.48.[1]

The government's cryptic reliance on *Mitchell v. United States*, 930 F.2d 893 (Fed. Cir. 1991), raises more questions than it answers about the government's jurisdictional position. *Mitchell* addressed whether the Adminis-

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[1] Though not entirely clear, the government appears to insinuate that because petitioners pled the Little Tucker Act as one of the bases of jurisdiction in the district court, their action was somehow transformed into a Tucker Act case. Op. Cert. 6. Of course, petitioners' complaint merely listed alternative bases of jurisdiction; doing so was in no way inconsistent with their position that 28 U.S.C. 1331, in combination with 29 U.S.C. 216(b), provided an independent, alternative basis of district court jurisdiction over their claims.

Moreover, contrary to the government's suggestion, petitioners never represented to the district court that the Federal Circuit's resolution of the then pending *Carter v. Gibbs*, 909 F.2d 1452 (Fed. Cir. 1990), would be "dispositive" (Op. Cert. 3) of any aspect of their action. Indeed, petitioners believed that the district court would not be bound by the Federal Circuit's decision in *Carter*; hence, they specifically argued to the district court that it possessed jurisdiction, independent of the Tucker Act, to hear their claims.

trative Procedure Act waived sovereign immunity with respect to a separated Air Force officer's claim for back-pay. The court concluded that, under 5 U.S.C. 704, the APA's limited waiver of sovereign immunity could not be invoked by the plaintiff because he had an adequate remedy in the Claims Court.

This case, of course, has nothing to do with the APA's limited waiver of sovereign immunity. The source of the waiver of sovereign immunity here is in the Fair Labor Standards Act. *Mitchell* simply does not address whether 28 U.S.C. 1331, in conjunction with an unconditional waiver of sovereign immunity such as that stated in 29 U.S.C. 216(b), provides a district court with subject matter jurisdiction independent of the Tucker Act.[2]

2. As we have established, the decision of the court below is in square conflict with holdings of the Second, Eighth, and D.C. Circuits that jurisdiction independent of the Tucker Act is conferred by jurisdictional statutes, such as 28 U.S.C. 1331, where another statute, such as 29 U.S.C. 216(b), waives the sovereign immunity of the federal government. *See C.H. Sanders Co. v. BHAP Housing Dev. Fund. Co.*, 903 F.2d 114, 119 (2nd Cir. 1990); *Trans-Bay Engineers & Builders, Inc. v. Hills*, 551 F.2d 370, 376-77 (D.C. Cir. 1976) and *Bor-Son Building Corporation v. Heller*, 572 F.2d 174, 181-82 (8th Cir. 1978). Indeed, the D.C. Circuit has explicitly acknowledged the divergent courts of appeals' rulings on the issue of whether 28 U.S.C. 1331, in conjunction with a separate waiver of sovereign immunity, provides a district court with jurisdiction independent of the Tucker

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[2] If anything, *Mitchell* only underscores the growing controversy among the circuit courts as to whether, under *Bowen*, claims for back pay are to be defined as equitable in nature; if they are to be so categorized, a serious question exists as to whether the Claims Court possesses Tucker Act jurisdiction over them *at all*. *See Hubbard v. Environmental Protection Agency*, 949 F.2d 453 (D.C. Cir. 1991); *Ulmet v. United States*, 888 F.2d 1028 (4th Cir. 1989); and *Bowen v. Massachusetts*, 487 U.S. 879, 913-921 (1988) (Scalia, J., dissenting).

Act. *Spectrum Leasing v. United States*, 764 F.2d 891, 895, n.8 (D.C. Cir. 1985).

a. The government claims that the issue presented by the instant case is "fundamentally" different from that addressed in *C.H. Sanders*, *Trans-Bay*, and *Bor-Son* because those cases involved a "classic" sue-and-be-sued clause. Op. Cert. 8-9. The government's tack is totally unavailing. The salient point of those cases is never met by the government's argument. To reiterate, each circuit held that jurisdiction independent of the Tucker Act is conferred by jurisdictional statutes, such as 28 U.S.C. 1331, where another statute, such as section 16(b) of the FLSA, waives sovereign immunity.[3]

That the waiver of sovereign immunity was in the form of a sue-and-be-sued clause had nothing to do with

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[3] To the extent the government is suggesting that we argue that 29 U.S.C. 216(b) by *itself* confers district court jurisdiction, it is in error. As we have stressed, district courts have jurisdiction, independent of the Tucker Act, over claims such as petitioners by virtue of 29 U.S.C. 216(b) in conjunction with 28 U.S.C. 1331.

We do not mean to imply, however, that a jurisdictional argument relying on section 216(b) alone is not meritorious. The language of section 16(b) is highly analogous to 12 U.S.C. 1702, which provides that the Secretary of Housing and Urban Development may be sued "in any court of competent jurisdiction, State or Federal." The Fourth Circuit has held that section 1702 itself confers subject matter jurisdiction in federal district courts. *See* Pet. 9, n.7. The Solicitor General has advised this Court of his agreement with this view. Brief for Respondents in Opposition, at 9, *Portsmouth Redevelopment and Housing Authority v. Pierce*, No. 83-90.

Moreover, as the Solicitor General's opposition brief in the instant case points out, this Court is currently considering whether 36 U.S.C. 2, which is also analogous to 29 U.S.C. 216(b), vests federal district courts with original jurisdiction over actions to which the American National Red Cross is a party. *American National Red Cross v. S.G. & A.E.*, No. 91-594. A decision holding that provision does provide jurisdiction would strongly indicate that 29 U.S.C. 216(b), by itself, is also jurisdictional in nature. Accordingly, and contrary to the government's suggestion, it would seem appropriate to hold this case pending resolution of *American National Red Cross*.

the rulings of the Second, Eighth and D.C. Circuits, on which we rely. As the Second Circuit succinctly explained, "an action . . . may be commenced under section 1331 in the district court provided there is an independent waiver of sovereign immunity outside the Tucker Act." *C.H. Sanders Co.*, 903 F.2d at 119. That is precisely the situation presented by the instant case.[4]

b. Further inapposite is the government's assertion that any money claim that requires payment from the general treasury necessarily requires reliance on the Tucker Act. This contention completely ignores the plain language of the FLSA, which expressly authorizes court actions against any "public agency," a term defined in section 3(x) as including "the Government of the United States," as well as any federal agency. 29 U.S.C. 203(x), 203(e)(2)(A), 216(b).

The government's reliance on the First Circuit's decision in *Cosme Nieves v. Deshler*, 786 F.2d 445 (1st Cir. 1986) *cert. denied*, 479 U.S. 824 (1986) is misplaced. That case antedated this Court's *Bowen* decision, and wrongly assumed, in dicta, that the Tucker Act provides the exclusive basis of jurisdiction for all claims against the United States for more than $10,000. Indeed, if anything, *Cosme Nieves* aids petitioners. The First Circuit expressly recognized that the FLSA waives the sovereign immunity of the United States and federal agencies.

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[4] Nor can the government defend the lower court's ruling on the grounds that the Tucker Act is somehow "more specific" (Op. Cert. 7) with respect to petitioners' claims. In contrast to the Tucker Act, the FLSA provides a specific waiver of sovereign immunity for overtime claims against the United States or any federal agency. 29 U.S.C. 216(b), 203(e)(2)(A), 203(x). And, as shown, 28 U.S.C. 1331 specifically confers jurisdiction on federal district courts for *all* civil actions arising under federal laws. *See also Miller, Wright, Cooper, Federal Practice and Procedure*, Jurisdiction 2d, section 3657 (1985) (footnote omitted) (describing Tucker Act as "general in character").

786 F.2d at 449-450. *See* 29 U.S.C. 216(b), 203(x), 203(e)(2)(A)(ii). As *Bowen* made clear, with such a waiver, and an independent basis of jurisdiction, resort to the Tucker Act is unnecessary. 487 U.S. at 910, n.48.[5]

3. The government unconvincingly maintains that, for two reasons, the posture of this case would make review inappropriate at this time.

First, the government urges that review should be denied because the court of appeals' decision to transfer this case to the Federal Circuit is interlocutory in posture. This Court regularly grants review, however, in civil cases that are interlocutory in nature when the question presented is jurisdictional. *See e.g., FSLIC v. Tictin*, 490 U.S. 82 (1989); *Bowen v. Massachusetts, supra*, *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949); *Land v. Dollar*, 330 U.S. 731 (1947).

More important, the government fails to acknowledge that, in view of the *en banc* ruling in *Carter v. Gibbs*, 909 F.2d 1452 (Fed. Cir. 1990), *cert. denied*, 111 S.Ct. 46 (1990), the Eleventh Circuit's ruling is the functional equivalent of dismissal of petitioners' claims. In *Carter*, the Federal Circuit held that where, as here, federal em-

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[5] The government's reliance on such cases as *Marcus Garvey Square, Inc. v. Winston Burnett Construction Co.*, 595 F.2d 1126 (9th Cir. 1979) is misplaced. The issue in *Garvey* was whether the district court had jurisdiction over a contract action for money damages in excess of $10,000 against the Secretary of Housing and Urban Development. Far from holding that the Tucker Act "controls" (Op. Cert. 9) whenever a claim must be paid from the general treasury, that decision expressly declined to decide whether the Tucker Act was an exclusive grant of jurisdiction. *Id.*, at 1132. The court determined that the real party in interest in *Garvey* was the United States, not the Secretary. The court concluded that the Tucker Act provided jurisdiction there because only its waiver of sovereign immunity applied to the particular "facts of this case." *Id.* As noted, the waiver of sovereign immunity provided by the FLSA is extremely broad and authorizes suit against the United States or any federal agency. 29 U.S.C. 216(b), 203(x).

ployees are covered by collective bargaining agreements that permit them to grieve FLSA claims, *no* court has subject matter jurisdiction over such claims. As the Eleventh Circuit itself acknowledged, its decision to dispatch petitioners to the Federal Circuit seals the fate of their appeal in view of the Federal Circuit's ruling in *Carter*. Pet. App. 8a.

Second, the government argues that this case may be moot. In support of this contention, the government maintains that many of the petitioners are covered by a collective bargaining arbitration decision holding that the Social Security Administration had illegally exempted them from the FLSA. Op. Cert. 5-6. The government's mootness contention is wholly without merit.

As an initial matter, we point out that a substantial number of petitioners are represented by the National Federation of Federal Employees and are not covered by the pending arbitration proceeding cited by the government. Whether the Social Security Administration will extend the potential benefits of that proceeding to those petitioners is highly conjectural.

Moreover, it is important to underscore that the collective bargaining proceeding noted by the government is still ongoing; the Federal Labor Relations Authority remanded the matter to the arbitrator who has yet to decide important remedial questions, such as the amount of backpay, whether liquidated damages are owing, and what statute of limitations applies. *U.S. Department of Health and Human Services, Social Security Administration, Baltimore, Maryland and American Federation of Government Employees*, 44 F.L.R.A. No. 66, at 28 (April 14, 1992). Hence, a final resolution of that arbitration would not seem to be imminent.

With respect to the still pending remedial questions at issue in that arbitration, it is also important to emphasize that the federal government takes the position that arbitrators, unlike courts, are not empowered by the

FLSA to award liquidated damages or attorneys' fees under that statute. Given this position, the government's suggestion that this case is somehow moot is curious. As this Court stressed in *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 750 n.16 (1981), the remedies of liquidated damages and fees are important incentives to individual prosecution of the FLSA and, therefore, key to promoting its public policies. In short, in light of the government's view of the limited remedies available in an arbitration of federal employee FLSA claims, this litigation is critical to vindicating the policies of the FLSA, and to insuring that all the petitioners get the full relief to which they are entitled under that Act.

5. Finally, rather than minimizing the significance of this case, the government's brief in opposition only highlights its critical importance. The government's unsuccessful attempt to refute our contention that the lower court's ruling is flatly at odds with this Court's *Bowen* decision, and conflicts with the holdings of several courts of appeals, signals that, without guidance from this Court, the jurisdictional issue petitioners pose will only continue to be litigated. The lower court rulings in the instant case illustrate that confusion will continue to grow, not only with respect to what appellate court may hear cases of this nature, but also with regard to whether jurisdiction and venue is proper in federal district court or the United States Claims Court. As Justice Scalia has observed, "[n]othing is more wasteful than litigation about where to litigate." *Bowen v. Massachusetts*, 487 U.S. at 930 (dissenting opinion).

Moreover, as the government acknowledges, the issue raised here has an undeniable impact on enforcement of the Fair Labor Standards Act. As we have discussed (Pet. 11-12), if the Federal Circuit possesses exclusive jurisdiction over cases such as this one, it will mean, given that court's ruling in *Carter*, *supra*, that hundreds

of thousands of federal workers will be unable to judicially enforce their FLSA claims. They will instead be channelled to a union-controlled grievance-arbitration procedure that, according to the government's position, is not designed to ensure them the full array of remedies guaranteed by the FLSA. Such a result will seriously undermine enforcement of the FLSA in the federal workplace.[6]

In view of the foregoing, this Court's review is imperative.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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[6] The petition for a writ of certiorari submitted in *Carter v. Gibbs*, No. 89-1675, fully discusses why the Federal Circuit's decision seriously undermines enforcement of the FLSA. Though the government argues otherwise (Op. Cert. 10, n.10), this Court's revisiting of the issue presented in *Carter v. Gibbs* would not be inappropriate. *See e.g., Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 817 (1988) ("petition for writ of certiorari can expose the entire case to review").